Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

No. 76-955

DOVER CONVEYOR & EQUIPMENT CO., INC.,
Petitioner,

vs.

THE OHIO SAVINGS & TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

A check dated December 7, 1971, issued by Petitioner payable to the order of "Lloyd Everett, General Contractor" drawn upon the Reeves Banking & Trust Company of Dover, Ohio, was acquired by Respondent on December 24, 1971, in the normal course of its business. The check was endorsed by Lloyd Everett. Respondent credited a portion of the proceeds of the check to the account of Lloyd Everett, the payee named thereon, and delivered the balance of the proceeds to the bearer of the check, his wife.

Said check was later returned by the payor-bank, the Reeves Banking & Trust Company, which refused payment and dishonored the same with the notation that Petitioner had stopped payment on said check.

Despite the reference in Petitioner's Brief (page 5) to the "apparent" endorsement of Everett, no evidence was introduced by Petitioner that Everett did not endorse the

check and Everett, in his Answer, admitted that he endorsed the check.

Furthermore, Petitioner neglects to mention that Respondent had contacted Petitioner prior to December 24, 1971, and had been advised that Petitioner would be issuing checks to Lloyd Everett in the future.

Respondent filed suit on January 27, 1972, in the Common Pleas Court of Tuscarawas County, Ohio, against Petitioner and Lloyd Everett.

Petitioner filed its Answer. Defendant Lloyd Everett filed his Answer and a Cross-Claim against Petitioner. Petitioner Answered the Cross-Claim of Defendant Lloyd Everett and filed its Cross-Claim against Everett seeking to recover its damages arising from negotiation of the check.

On July 6, 1972, Defendant Lloyd Everett and Petitioner approved and filed a Judgment Entry settling and dismissing their respective Cross-Claims.

On April 7, 1975, Respondent filed its Motion for Summary Judgment supported by an affidavit, admissions in the pleadings, and the depositions. Petitioner filed no evidence in opposition to said Motion.

The Trial Court sustained Respondent's Motion for Summary Judgment on October 27, 1975.

Petitioner appealed the Order of the Trial Court to the Fifth District Court of Appeals which unanimously affirmed the judgment of the Tuscarawas County Common Pleas Court.

Petitioner appealed to the Ohio Supreme Court which dismissed the appeal for the reason that no substantial constitutional question was raised (Respondent's Appendix A).

REASON FOR DENYING THE WRIT

1. The decisions of the Supreme Court of Ohio and the Fifth District Court of Appeals do not conflict with the due process principles enunciated by decisions of this Court.

Petitioner contends it was unable to raise the issue of payment of the obligation underlying the check. However, Petitioner did raise that issue as to the payee of the check (Everett), and Petitioner and Everett resolved this claim in the State Court proceedings. Consequently, Petitioner appears to be raising a spurious issue in an attempt to challenge the constitutionality of the Ohio statutes relating to holder in due course.

Petitioner argues that a due process violation exists because Petitioner is prevented by Ohio statute from raising certain defenses against a holder in due course of a check that it could have raised against a mere holder of a check. Petitioner's argument, which is framed as a procedural due process attack, ignores the crucial fact that Petitioner can assert only those defenses that the law establishes as defenses. Petitioner is attempting to raise alleged defenses that the Ohio law has explicitly stated are not defenses to a holder in due course. Since Petitioner could, *and did*, assert his claims against its payee/endorser, the holder in due course statute does not amount to a denial of procedural due process.

Three of the United States Supreme Court cases cited by Petitioner, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), involve situations where property was taken from one party before a hearing was held to establish whether that party

had any legally available defense to the underlying claim. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), the issue was adequacy of notice under a New York statute. In the instant case, no property was taken from Petitioner before the filing of the Complaint nor before an opportunity to be heard.

Since it is meaningless to talk about being denied the opportunity to present a "defense" that is not a legally available defense, Petitioner's argument is apparently an attack upon the constitutionality of the Ohio legislature's affording a holder in due course immunity from certain defenses, rather than an attack upon the procedural aspects. To support such a *substantive* due process argument Petitioner must prove that the legislature acted arbitrarily or unreasonably in granting such protection to a holder in due course. *Ferguson v. Skrupa*, 372 U.S. 726 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Considering that the holder in due course provision certainly encourages the negotiability of commercial paper, the Ohio legislature did not act arbitrarily or unreasonably but was within the limits of its constitutional authority.

The United States Fifth Circuit Court of Appeals, dealing with a note and mortgage rather than a check, rejected the same due process constitutional attack in *Hardy v. Gissendaner* (5th Cir.), 508 F.2d 1207, 1209 (1975):

> "Underlying plaintiffs' claim, however, is the contention that the Alabama Holder-in-due course law deprives them of a meaningful hearing by divesting them of their right to interpose legitimate defenses and therefore is unconstitutional. We do not agree. Plaintiffs' theory is based on the contention that the pertinent Alabama law prevents them from asserting the defenses of inferior and incomplete performance of consideration given for the underlying debt.

* * * * *

> While due process requires that there be an opportunity to present every available defense, the fact that plaintiffs are barred from interposing certain defenses against Gissendaner [holder in due course], does not amount to a denial of due process where, as here, they are not foreclosed from pursuing their claims for damages or any other relief to which they are entitled against the individual with whom they contracted. Nothing in Alabama law prevents them from doing so. Any deprivation suffered by plaintiffs is the result of the dereliction of the person with whom they had the misfortune of dealing, not the inadequacy or the invalidity of the law." (citations omitted)

The rationale of *Hardy* is particularly applicable to the present case, since Petitioner, in fact, asserted its claims against the payee/endorser (Everett) in this proceeding and apparently settled same to its satisfaction.

The Fifth Circuit Court of Appeals also discussed the policy rationale underlying the concept of holder in due course:

> "The holder-in-due course concept has long been recognized and used as a vehicle for promoting easy, fast, and inexpensive negotiability of commercial paper. Article 3 of the Uniform Commercial Code dealing with commercial paper and which outlines the rights of a holder in due course, identical to those of Alabama, 'is a continuum of commercial concepts. It is a development that can be traced direct to the genius of Lord Holt and that of Lord Mansfield when they incorporated the Law Merchant into the common law.' If the

law is in need of further change because of certain inequities suffered by consumers through credit transactions, it must be accomplished by the state legislature." *Hardy v. Gissendaner*, 508 F.2d 1207, at 1209-10 (5th Cir. 1975) (citations omitted).

CONCLUSION

The Ohio Courts correctly determined that no substantial constitutional question exists in the instant case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Order of the Supreme Court of Ohio Overruling Motion to Certify

(Filed October 14, 1976)

No. 76-896

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO)
)
CITY OF COLUMBUS.)

OHIO SAVINGS & TRUST COMPANY,
Appellee,
vs.
DOVER CONVEYOR & EQUIPMENT CO., *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Tuscarawas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.